(20)

No. 98-404

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,
Appellants,

v.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, AMERICAN CONSERVATIVE UNION, AMERICANS FOR TAX REFORM, ASSOC. OF AMERICAN PHYSICIANS AND SURGEONS, CAPITOL WATCH, CITIZENS FOR JUDICIAL REFORM, COALITION OF VIRGINIA TAXPAYERS, FRONTIERS OF FREEDOM INSTITUTE, INDEPENDENT WOMEN'S FORUM, PATRICK PIZZELLA, DR. DON RACHETER, 60 PLUS ASSOCIATION, SMALL BUSINESS SURVIVAL COMMITTEE, and TOWARD TRADITION AS *AMICI CURIAE* IN SUPPORT OF U.S. HOUSE OF REPRESENTATIVES

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QUESTIONS PRESENTED

Amici curiae address the following issue only:

> Whether the Census Act prohibits the Secretary from employing statistical sampling in arriving at a population figure for the purpose of apportioning Representatives among the States.

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INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] While WLF engages in litigation in a wide variety of areas, WLF devotes a substantial portion of its resources to ensuring that governments at all levels adhere strictly to federal constitutional norms. To that end, WLF has appeared before this Court as well as other federal and state courts in cases involving alleged government violation of the U.S. Constitution. *See, e.g., Phillips v. Washington Legal Found.,* 118 S. Ct. 1925 (1998).

The Allied Educational Foundation, the American Conservative Union, Americans for Tax Reform, the Association of American Physicians and Surgeons, Capitol Watch, Citizens for Judicial Reform, Coalition of Virginia Taxpayers, Frontiers of Freedom Institute, Independent Women's Forum, 60 Plus Association, Small Business Survival Committee, and Toward Tradition are all non-profit groups that share an interest in limited and accountable government, and a government that adheres to constitutional norms.

Patrick Pizzella is a citizen of Virginia. Dr. Don Racheter is a citizen of Iowa. Both are concerned that their constitutional right to a fair apportionment of the U.S. House of Representatives, based on an "actual Enumeration" of residents of this country, is being threatened by

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

Appellants' plan to employ statistical sampling in connection with the 2000 Census.

All of the *amici curiae*, other than the Frontiers of Freedom Institute and the Small Business Survival Committee, filed a brief in this case in support of the U.S. House of Representatives in the district court.

All 15 of the *amici curiae* are very concerned that Appellants' plan to employ statistical sampling in connection with the 2000 Census dramatically increases the risk that census figures will be manipulated for partisan political purposes. *Amici* believe that the mere risk of such manipulation may result in a loss of public confidence in the fairness of the decennial census and a breakdown in consensus regarding the reapportionment process.

Amici submit this brief in support of Appellee House of Representatives, with the written consent of all parties. The written consents are on file with the Clerk of the Court.

INTRODUCTION

The conduct of a census to be used in apportioning seats in the U.S. House of Representatives is a matter of tremendous importance to the American system of government. Public support for our democratic institutions cannot be maintained unless citizens in all 50 States believe that their States have been allotted their fair share of seats. It is important not only that the apportionment censuses be conducted as fairly as possible, but also that the general public perceive that they are being conducted fairly.

Our nation's first 21 decennial censuses largely met those goals. Each was conducted as an actual "headcount"; *i.e.*, numbers were tallied only after identifiable individuals were determined to reside at specific locations within a State. It has been recognized since the 1790 Census that a headcount is bound to miss some residents, and that residents sharing certain characteristics (*e.g.*, rural residents) are missed at disproportionate rates. Nonetheless, the headcount method of counting has been maintained, both because it is thought to be generally accurate (and has been getting increasingly accurate) and because it is effective in preventing manipulation of census figures for partisan purposes.

Appellant U.S. Department of Commerce ("Commerce") has announced plans to conduct the 2000 Census in a manner that is fundamentally different from the headcount method that has been employed since 1790. Appellants will not even attempt to enumerate all those residing in the United States. Instead, the Census Bureau will attempt to count only 90% of all residents. Once that goal is reached, it will employ a variety of statistical sampling techniques to arrive at what it believes will be a reasonable estimate of the population of each State. Appellants assert that the population figures derived in this manner will be more accurate than those that could be derived from a headcount.

Amici do not dispute that the State population totals derived through a statistical sampling methodology are *potentially* more accurate than those that could be achieved through a headcount (albeit there will never be a definitive answer regarding that issue if Appellants are permitted to proceed as planned, because there will be no complete headcount in the 2000 Census). Nonetheless, *amici* oppose

Appellants' statistical sampling methodology because it dramatically increases the risk that census figures will be manipulated for partisan political purposes. The mere risk of such manipulation, which would be virtually impossible to detect, may well result in a loss of public confidence in the fairness of the decennial census and a breakdown in consensus regarding the reapportionment process.

Both the Framers (when drafting the Constitution) and Congress (when adopting census legislation) sought to avoid the possibility that the decennial census and apportionment decisions could be tainted by partisan consideration. That concern is reflected in the language of the Constitution and the census statutes, which prohibit use of statistical sampling in deriving census figures that will be used for apportionment.

Amici fully concur with the House of Representatives's arguments regarding the proper interpretation of relevant constitutional and statutory language. Rather than repeating those arguments here in full, however, *amici* devote a considerable portion of this brief to a discussion regarding the significant dangers of political manipulation inherent in Defendants' plan for carrying out the 2000 Census. Those dangers underscore both the need to enforce the headcount requirement imposed by the Constitution and federal law, and the need to resolve this issue now rather than after a constitutionally defective census has been completed.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Case contained in the brief of Appellee U.S. House of Representatives. *Amici*

nonetheless include a lengthy history of the conduct of decennial censuses in this country; *amici* believe that a full historical account is vital to understanding Congress's intent in adopting the Census Act provisions whose meaning is in dispute.

The requirement for a decennial census derives from the U.S. Constitution. A cornerstone of the agreement that gave birth to our national government, the census requirement was designed to ensure that both direct taxes and political power were shared equitably among those from all regions of the country:

> Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers. . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such manner as they shall by Law direct.

U.S. Const. art. I, § 2, cl. 3.

One of the Framers' primary concerns was that the decisions respecting the allocation of direct taxes and political power not be subject to partisan manipulation. Thus, for example, the requirement that a new census be conducted every ten years was designed "to ensure that entrenched interests in Congress did not thwart or stall needed reapportionment." *Franklin v. Massachusetts,* 505 U.S. 788, 791 (1992)(citing 1 M. Farrand, *Records of the Federal Convention of 1787 ("Federal Convention"),* at 571, 578-588 (rev. ed. 1966)).

The Framers were also very concerned with the method by which each State's population was computed. Their chief concern was that the population count be as accurate as possible; and they recognized that partisan manipulation was the *principal force* that could lead to inaccurate counts. Thus, conduct of the census was placed into the hands of federal government officials, rather than leaving State officials (who might have reason to doctor the results) responsible for ascertaining their own population. *Id.* at 580. The Framers also decided that the population would be determined by an "actual Enumeration," rather than by using one of the various types of estimating methodologies commonly used to determine population in Colonial times. *Id.* at 578-79.

The objection to the use of estimates was not that they were thought *inherently* inaccurate. Many of the eighteenth century State population estimates (based on poll tax records, militia rolls, and similar data) were accepted as accurate, and were roughly in line with the population totals calculated in the 1790 Census.[2] Rather, the objection was that relying on estimation failed to provide a "permanent and precise standard" that was immune to manipulation. *Id.* Indeed, a primary reason that the Framers rejected wealth as the measure of direct taxation and congressional apportionment was that wealth could not

[2] The Constitution provided that, until the first decennial census could be completed, seats in the U.S. House of Representatives were to be apportioned among the thirteen States as specified in Art. I, § 2, cl. 3. That apportionment, which apparently was based on existing State population estimates (*see* Congressional Research Service, *Sampling for Census 2000: A Legal Overview*, (Sept. 1997) at 2-3), proved to be closely in line with the apportionment that followed the 1790 Census.

be measured nearly as objectively as could population. *Id.* at 603.[3]

The Census Since 1790. Each of the decennial censuses conducted between 1790 and 1990 employed (at the direction of Congress) a "headcount" methodology, whereby enumerators tabulated individuals actually identified as living in United States. The first five censuses were conducted pursuant to the 1790 Census Act, which appointed federal marshals to conduct a "just and perfect enumeration and description of all persons." Similarly, the Act of March 26, 1810 stated that the enumeration was to be made "by an actual inquiry at every dwelling house, or the head of every family within each district, and not otherwise." Ch. 17, 2 Stat. 564.

Substantially similar requirements appeared in subsequent census legislation. The Act of May 23, 1850, ch. 11, 9 Stat. 428, 430 (as amended by the Act of August 30, 1850, ch. 43, 9 Stat. 445, the "1850 Census Act"), which governed the seventh, eighth, and ninth censuses, similarly required that the census takers make "a personal visit to each dwelling house, and to each family," and generate responses "by inquiries made of some member of each family, if anyone can be found capable of giving the

[3] Under the Articles of Confederation, the costs of maintaining the national government had been allocated among the States "in proportion to the value of all land within each State, . . . estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint." Articles of Confederation, Art. VIII. Because political power under the Confederation was not allocated on the basis of population (each State had an equal vote in legislative matters (Art. V, § 4)), there had been no need to conduct a national population count during the Confederation period.

information, but if not, then the agent of such family." The Acts that governed the following eight censuses provided similar instructions to census takers.[4] This requirement was carried over in 13 U.S.C. § 25(c) when the current Census Act was codified in 1954.

The Secretary of Commerce considered and rejected proposals that the 1990 Census cease its reliance on "headcount" methodology and instead employ large-scale adjustments based on statistical sampling, finding that reliance on statistical sampling would "abandon a two hundred year tradition of how we actually count people." *Wisconsin v. City of New York,* 116 S. Ct. 1091, 1097 (1996) (quoting *Decision of the Secretary of Commerce on Whether a Statistical Adjustment of the 1990 Census of Population and Housing Should Be Made for Coverage Deficiencies Resulting in an Overcount or Undercount of the Population* ("Mosbacher Statement"), 56 Fed. Reg. 33582 (July 22, 1991)).

Collecting Information Beyond Population Figures. Throughout the 1800's, there developed a large demand for information about the American population beyond simply the number of citizens within each jurisdiction. Thus, census takers began to be directed to ask a series of questions in addition to the number of members of each household. In 1840, for example, census takers sought answers to an extended list of questions, including

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[4] *See* Act of March 3, 1879, ch. 195, 20 Stat. 473, 475, as amended by Act of April 20, 1880, ch. 57, 21 Stat. 75; Act of 1889, ch. 319, 25 Stat. 760, 763; Act of March 3, 1899, ch. 419, 30 Stat. 1014, 1018; Act of July 2, 1909, ch. 2, 36 Stat. 1, 5; Act of March 3, 1919, ch. 97, 40 Stat. 1291, 1296; Act of June 18, 1929, ch. 28, 46 Stat. 21, 22 (governing the 15th, 16th, and 17th censuses).

questions on mental illness, occupations, and literacy. William S. Holt, *The Bureau of the Census: Its History, Activities and Organization* 11 (The Brookings Institution 1929). The 1840 census was widely criticized as inaccurate, with many attributing the inaccuracies to citizens' unwillingness to answer questions thought too numerous or intrusive. *Id.* at 13 (citing S. Rep. 146, 28 Cong., 2d Sess. (1840)).

As the number and scope of such questions grew throughout the 19th century, they came to be known as the "second census," and were the subject of considerable controversy because of their known tendency to decrease census accuracy. Margo J. Anderson, *The American Census: A Social History* 59 (1988). In order to satisfy the insatiable demand (both from government and the private sector) for information about the population without making the census impossibly cumbersome, the government began to rely on "statistical sampling." *Id.* at 180-87. Census officials learned how to derive reasonably accurate information about the population as a whole based on answers given by only a small percentage of census respondents. The federal government's need for detailed information about the population became particularly great after the 1930s -- when it began using census data to allocate federal funds (*id.* at 179) -- a need that could not have been satisfied if census takers had been required to obtain the necessary information from every census respondent.

In 1940, the Census Bureau formalized the practice of using "long form" census reports, whereby a small segment of the public was asked detailed questions for purposes unrelated to population estimation. Bureau of the Census, *The History, Operations, and Organization of the Bureau*

of the Census 6 (1946) (long forms sent to one out of every 20 people). In 1957, Congress amended the Census Act at the request of the Secretary of Commerce, adopting 13 U.S.C. § 195 to make clear that the Secretary was authorized to use statistical sampling in this manner. But Congress made clear that that authority did not extend to use of sampling to calculate the population for purposes of apportioning congressional seats. *See* Pub. L. 85-207, § 14, 71 Stat. 481, 484 ("Except for the determination of population for apportionment purposes, the Secretary may . . . authorize the use of . . . 'sampling' in carrying out the provisions of this title"). In sum, while the government has employed sampling throughout this century in connection with the "second census," that practice has always been viewed as consistent with the government's simultaneous strict adherence to headcounts when it comes to counting the population for apportionment purposes.

Undercounts. From the 1790 Census to the present, the federal government has recognized that some residents are missed in a "headcount" census. As the Supreme Court stated in *Wisconsin*:

> Although each [of the 20 decennial censuses in U.S. history] was designed with the goal of accomplishing an "actual Enumeration" of the population, no census is recognized as having been wholly successful at achieving that goal. 2/
>
> 2/ Indeed, even the first census did not escape criticism. Thomas Jefferson, who oversaw the conduct of that first census in 1790 as Secretary of State, was confident that it had significantly undercounted the young Nation's population. See C. Wright, *History and Growth of the United States Census* 16-17 (1900).

Wisconsin, 116 S. Ct. at 1094 & n.2.

Moreover, this "undercount" has always been understood to be greater among some segments of the population than in others. For example, Jefferson recognized following the 1790 Census that those living in remote areas were more likely to have been missed than those living in cities. This admitted differential undercount nonetheless did not cause federal officials to abandon the "headcount" methodology in favor of statistical adjustments to compensate for the undercount. Since 1940, the Census Bureau has recognized that the undercount tends to be somewhat higher among some racial and ethnic groups (particularly blacks and Hispanics) than among others. Despite suggestions to the contrary by the Appellants and their supporters, this undercount differential has not changed markedly since first identified in 1940; and there is every reason to believe that in each of our 21 decennial censuses, the undercount was not uniform among all races and ethnic groups.

While decennial censuses have become increasingly complex and expensive, they also have become increasingly accurate. The 1980 Census and the 1990 Census, which both employed traditional headcount methodology, are generally conceded to have been the most accurate in the nation's history. *See, e.g.*, Mosbacher Statement, 56 Fed. Reg. at 33582. Post-census analysis indicates that in each

of those two censuses, more than 98% of the U.S. population was counted.[5]

Nonetheless, jurisdictions with the largest concentrations of members of groups thought to suffer the highest undercount levels have for several decades been asking the Census Bureau to make statistical adjustments to the headcount, in order to compensate for the undercount. In 1980, the Carter Administration declined requests to adjust the 1980 Census headcount, not only because there was little assurance that the adjustments would improve accuracy but also because the Constitution and federal law prohibited such adjustments based on statistical sampling. *Census Undercount Adjustment: Basis for Decision,* 45 Fed. Reg. 69366 (Oct. 20, 1980).[6] In 1991, the Bush Administration similarly declined requests to adjust the 1990 Census headcount. Commerce Secretary Mosbacher cited as a principal reason for his decision the danger that permitting adjustments to the headcount would open the census to partisan manipulation. Mosbacher Statement, 56 Fed. Reg. at 33600-33603. The decision not to adjust the 1990 Census based on statistical sampling was upheld by the Supreme Court in *Wisconsin*.

Appellants' Plan for the 2000 Census. In a report issued in July 1997, the Census Bureau announced that it had abandoned its 200-year-old practice and will not

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[5] Those figures rebut the oft-heard argument that headcounts may have been feasible in the past but are becoming increasingly less so as the population expands.

[6] The federal census laws have not changed in any material respects since this 1980 decision.

employ a headcount methodology in connection with the 2000 Census.

The plan for the 2000 Census calls for mailing out census forms to a comprehensive list of households nationwide similar to mailings in the past three censuses. The plan thereafter deviates sharply from past censuses. Instead of an intensive effort to follow up with *all* households that failed to respond to the initial mailing (as occurred in the past), the Census Bureau will contact only a statistical sample of households that did not respond. The size of that sample will vary depending on the percentage of households within each census tract who responded to the initial mailing. The goal of the follow-up sample is to ensure that information has been obtained from 90% of households within each census tract. For example, if the initial response rate were 85%, then a sample consisting of one in three nonresponding households would be contacted in order to bring to 90% the percentage of those responding (85% + (1/3 x 15%) = 90%); similarly, if the initial response rate were 40%, then five out of six nonrespondents would be contacted. On the basis of the demographic composition of the sample households surveyed in this "nonresponse follow-up," the Census Bureau will estimate the number and demographic composition of individuals within the 10% of households not contacted.

Once the "nonresponse follow-up" has reached its 90% goal, the Census Bureau intends to begin its Integrated Coverage Measurement (ICM) phase: a second estimate of the population based on a survey of 750,000 households in 25,000 census blocks spread across all 50 States. The 25,000 blocks (out of seven million blocks nationwide) will *not* be randomly selected; rather, they will be "carefully . . . selected to include blocks from all areas of the country,

with all race and ethnic groups, from all sizes of towns and cities, and from rural areas." Bureau of the Census, *Report to Congress -- The Plan for Census 2000* (rev. Aug. 1997) at 29. In simplified form, the objective of the ICM is to compare the initial census count in those 25,000 blocks to the count obtained during the intense door-to-door survey conducted during the ICM. That comparison will be used to calculate what the Bureau believes to be the likelihood that individuals with specific demographic characteristics (for example, urban black males age 21 to 35 who rent their living quarters) were not counted in the initial census count. That likelihood (referred to by the Bureau as the "estimation factor") will then be multiplied by the number of individuals within each census tract known to share those same demographic characteristics and who were identified in the initial census count, in order to arrive at an adjusted population total for each census tract. *Id.* at 31-32.

Challenge to the Census Bureau's Plan. In February 1998, the U.S. House of Representatives (the "House") filed this suit challenging Commerce's plan to use statistical sampling (as described above) rather than a traditional headcount in connection with the 2000 Census. The House asserted that the plan violates a prohibition against such statistical sampling contained in 13 U.S.C. § 195 and also violates the requirement of Art. I, § 2, cl. 3 of the Constitution that a decennial census used for apportionment purposes must be an "actual Enumeration."

On August 24, 1998, the district court granted the House's motion for summary judgment. Jurisdictional Statement Appendix ("Jur. App.") 1a-67a. The court determined that Commerce is prohibited from employing statistical sampling in conducting an apportionment census,

by virtue of 13 U.S.C. § 195. Jur. App. 48a-59a. The court determined that reading such a prohibition into § 195 was the most logical interpretation of the words in the statute, and was also supported by the legislative history preceding adoption of the current statutory language in 1976. The court determined that the prior version of § 195 had unambiguously prohibited statistical sampling in the congressional apportionment process; the absence of evidence that Congress in 1976 thought it was radically altering § 195 led the court to conclude that Congress did not intend its 1976 changes in § 195's language to eliminate that prohibition. *Id.* at 54a-59a.

The district court also rejected Commerce's argument that another provision of the Census Act, 13 U.S.C. § 141(a), affirmatively authorizes statistical sampling in the congressional apportionment process. Jur. App. 59a-64a. In light of its statutory findings, the court declined to address the House's alternative argument that Commerce's contemplated use of statistical sampling violated Article I, § 2, cl. 3 of the Constitution. Jur. App. 64a.

SUMMARY OF ARGUMENT

13 U.S.C. § 195 is susceptible to only one reasonable interpretation: it forbids use of statistical sampling in connection with any census data to be used "for apportionment purposes." Any other interpretation of the statute would render the quoted words meaningless. Commerce is correct that the House's interpretation of § 195 results in some of the language in § 195 being repetitive of some of the language in 13 U.S.C. § 141. But *amici* fail to see how that result renders the House's interpretation unreasonable. *Amici* believe it highly plausible that if Congress felt strongly about encouraging the Census

Bureau to use statistical sampling for nonapportionment purposes, it would include words of encouragement in *both* § 141 and § 195, even if one such reference would have been legally sufficient.

A major concern of both the Framers of the Constitution (in adopting the "actual Enumeration" requirement) and of Congress in adopting § 195 was to prevent the census from being subject to partisan manipulation. *Amici* believe that the plan adopted by Defendants for the 2000 Census will vastly increase the census's susceptibility to such manipulation. As Commerce Secretary Mosbacher recognized in rejecting a proposal to adjust the 1990 Census figures, there are numerous alternative, equally plausible methods one could adopt in utilizing statistical sampling to adjust census figures. Because the political ramifications of many such alternatives will be known before one alternative is adopted, the potential for partisan manipulation of census results is significant. Mosbacher Statement, 56 Fed. Reg. at 33585. Moreover, employing statistical sampling dramatically increases the incentives for those being surveyed to craft their responses in such a way as to maximize partisan advantage.

The significant potential for partisan manipulation of census results underscores the need to enforce the headcount requirement imposed by the Constitution and federal law -- imposed for the primary purpose of preventing such partisan manipulation.

ARGUMENT

I. THE CENSUS ACT PROHIBITS THE USE OF SAMPLING TO DETERMINE THE U.S. POPULATION FOR PURPOSES OF APPORTIONMENT

The House's statutory claims turn on the proper interpretation of 13 U.S.C. § 195, which provides:

> *Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States*, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of [Title 13 of the U.S. Code].

13 U.S.C. § 195 (emphasis added).

Amici agree with the House's interpretation of this provision of the Census Act and thus will not repeat here all the arguments advanced by the House in support of its interpretation. Suffice to say that Commerce's interpretation (that the first clause of § 195 merely *permits* the Bureau to dispense with statistical sampling in its apportionment census work but does not *require* it to do so) is not plausible when the Census Act is read as a whole. While the second clause's use of the word "shall" indicates strong congressional support of statistical sampling, Commerce is simply wrong in suggesting that the second clause "mandates" statistical sampling in any situation in which the Bureau would seriously consider not doing so. Rather, the second clause states that sampling "shall" be used *only* when it is "feasible" to do so. *Any* Bureau decision not to employ sampling presumably would be

based on a Bureau determination that sampling is not feasible, because the time and cost savings inherent in use of sampling make it likely that the Bureau would use sampling for census work whenever it were feasible to do so.[7] Commerce's interpretation of § 195 thus renders the first clause of that statute meaningless. While strongly encouraging use of sampling in at least some settings, the second clause grants the Secretary discretion not to employ sampling *whenever* its use is deemed unfeasible, so the first clause adds nothing if all it means is that the Secretary is not required to use sampling in its apportionment census work.

Appellants insist that Congress's true feelings regarding use of sampling in the reapportionment context are to be found by examining 13 U.S.C. § 141(a), even though that provision makes absolutely no mention of reapportionment census work. *See, e.g.*, Commerce Br. 25-27. They insist that § 195 cannot be interpreted as prohibiting sampling in the reapportionment context because otherwise it would conflict with the terms of § 141(a). They further insist that the district court's interpretation of § 195 was in error because it "disregard[ed] the cardinal rule of statutory interpretation that a statute must be read consistently in order to construe each part or section in connection with every other part or section so as to produce a harmonious whole." Nat'l Korean Br. 22.

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[7] As noted above, the Commerce Department in 1991 determined that it was unfeasible to use statistical sampling to adjust State population figures for the 1990 Census, in part because doing so would increase the danger of partisan manipulation of the census. 56 Fed. Reg. at 33585. The Commerce Department thus was not required to invoke the first clause of § 195 at all, or to address whether adjustments were prohibited by § 195.

But the district court's interpretation of § 195 does *not* place it into conflict with § 141(a). While § 141(a) provides the Secretary with generalized discretion to employ statistical sampling, it does not speak to the use of sampling in the reapportionment context. There is no internal inconsistency within a statute when one provision provides a generalized endorsement of a practice and another provision prohibits the practice in one very specific context.

In sum, the arguments in support of the House's interpretation of § 195 are far stronger than those espoused by Defendants. Particularly when one considers that: (1) there is virtually no doubt that the pre-1976 version of § 195 prohibited use of statistical sampling in connection with determining populations for apportionment purposes; and (2) there is no indication (in either the Census Act or its legislative history) that Congress desired to lift that prohibition when it amended § 195 in 1976, the House's interpretation of § 195 is by far the more plausible.

II. THERE IS NO EVIDENCE THAT CONGRESSIONAL LEADERS CONTEMPLATED THE SEA CHANGE IN § 195 THAT APPELLANTS ASSERT WAS EFFECTED BY THE 1976 AMENDMENT

Although Commerce contends that the 1976 amendment to § 195 transformed the statute from one that prohibited apportionment sampling to a statute that permitted it at the Secretary's discretion, Commerce makes no effort in its brief to demonstrate that those serving in Congress at the time actually intended such a result. Although various of the Intervenors and supporting *amici* attempt to fill that void, their efforts are ultimately unavailing.

Intervenors Richard Gephardt, *et al.*, contend that in the mid-1970s "Congress was well aware" of the Bureau's use of statistical estimation in the 1970 Census, approved of the use of those methods, and included amendments to the Census Act in 1976 "to conform more closely to the current language and practices used by the Bureau." Gephardt Br. 30-31 & n.20 (citing S.Rep. No. 94-1256, at 6 (1976)). Intervenors have misread the Senate Report. The report specifically identifies the "technical changes" proposed for the purpose of "conform[ing]" the Census Act to "practices used by the Bureau," and neither of the changes relevant to this lawsuit -- the changes to §§ 141(a) and 195 -- appear anywhere on that list. *See* S.Rep. 94-1256, at 3-7. Nor is there any suggestion in any of the hearings, reports, or debates surrounding the 1976 amendment that Members of the 94th Congress had *any* knowledge whatsoever of the Bureau's limited use of sampling under exigent circumstances in 1970.

Intervenors note that a House Committee, during hearings conduct in 1970, acquired limited knowledge concerning the Bureau's use of sampling in the 1970 Census.[8] Gephardt Br. 31 (citing H.R. Rep. 91-1777 (1970)). But that hearing took place six years before the

[8] While the report was complimentary of the Bureau's efforts in 1970, it is not at all clear from the subcommittee's report that it understood that the Bureau had made use of sampling to estimate population for apportionment purposes (in violation of § 195), and not simply to double-check coverage. *Amici* note, moreover, that when Bureau Director George H. Brown briefed the subcommittee, he emphasized that "the census is a name-by-name accounting of each dwelling unit or other place of abode for the entire population. It is not an estimate." *See Accuracy of 1970 Census Enumeration and Related Matters: Hearings Before the Subcomm. on Census and Statistics of the House Comm. on Post Office and Civil Service* 7, 91st Cong., 2d Sess (Sept. 1970).

amendments at issue in this case. The 1970 Census programs that made limited use of sampling were never mentioned in the hearings, reports, or debates surrounding the 1976 amendments, nor were they employed during the 1980 Census.

In an effort to explain the failure of even a single legislator to mention the "repeal" of the sampling prohibition, Intervenors assert that use sampling to produce population figures was simply not that big an issue in 1976, and that it was "anachronistic for the district court to assume that Congress in 1976 could not have meant to give the Census Bureau discretion" to decide whether to employ apportionment sampling. Gephardt Br. 33. Intervenors' contention that apportionment sampling has only recently become a controversial topic is patently incorrect. Indeed, concerns that mid-decade census statistics (which are *not* derived from a headcount) might be used for congressional apportionment and districting prevented passage of legislation authorizing a mid-decade census for more than a decade in the 1960s and 1970s. H. Conf. R. No. 94-1719 at 17. Passage of the 1976 amendments was made based upon express assurances, as set forth in the House Report, that "this legislation will not affect apportionment or districting of congressional seats." *Id.* at 4.

Although Intervenors contend that the hearings held and legislation introduced in 1976-77 to address the prospect of an undercount in the 1980 Census support their view that authority had already been conferred in 1976 to use sampling to adjust census totals (Gephardt Br. 35-36), those subsequent legislative developments support the opposite conclusion. Indeed, during June 1976 hearings conducted to consider the ramifications of the undercount, the Director of the Bureau of the Census testified that it

was the Bureau's "goal" to develop techniques to allow it to provide Congress both "with an enumeration and an estimate . . . of the undercount" so that Congress could decide whether an adjustment of figures was warranted. Hearing at 13-20. Nothing in the Director's testimony indicated a belief that the Bureau had already been granted complete discretion to determine whether to use sampling to adjust population figures.

III. COMMERCE'S PLAN FOR THE 2000 CENSUS WOULD SIGNIFICANTLY INCREASE ITS SUSCEPTIBILITY TO PARTISAN MANIPULATION

A major concern of both the Framers of the Constitution (in adopting the "actual Enumeration" requirement) and of Congress in adopting § 195 was to prevent the census from being subject to partisan manipulation. *Amici* believe that the plan adopted by Commerce for the 2000 Census will vastly increase the census's susceptibility to such manipulation. The significant potential for partisan manipulation of census results underscores the need to enforce the headcount requirement imposed by the Constitution and federal law -- imposed for the primary purpose of preventing such partisan manipulation.

Amici do not mean to impugn the reputation of the Census Bureau's professional staff; *amici* have no information suggesting that the Census Bureau will, in fact, succumb to pressure to manipulate its figures to benefit one political faction or another. However, it cannot be seriously doubted that census figures have long been a hot political issue. The decisions not to use statistical sampling in connection with the 1980 Census and the 1990 Census

led to numerous federal lawsuits, while the decision to use statistical sampling in connection with the 2000 Census has spawned at least two federal court challenges. Not surprisingly, those who supported the 1980 and 1990 challenges generally are on the opposite side of the political fence from those supporting the 2000 challenges. Nor is it surprising that those Members of Congress seeking to intervene as Defendants in opposition to the Republican-controlled House of Representatives are all Democrats. In light of the politically charged atmosphere surrounding the use of statistical sampling, there is a significant danger that its use could undermine public confidence in the census and the reapportionment process.

Moreover, there is little doubt that introduction of statistical sampling into the decennial census process will vastly increase the potential for manipulation, both by those charged with running the census and by those being counted. The potential for manipulation was one of the principal reasons cited by Secretary Mosbacher for declining to use statistical sampling to adjust the "headcount" for the 1990 Census. Mosbacher Statement, 56 Fed. Reg. at 33583, 33585, 33599-33603.

Secretary Mosbacher's concerns are equally applicable to the 2000 Census, given that the ICM is substantially similar to the statistical sampling undertaken in connection with the 1990 Census. He noted, for example:

> To calculate a nationwide adjustment from the survey, a series of statistical models are used which depend on simplifying assumptions. Changes in these assumptions result in different population estimates. Consider the result of two possible adjustment methods that were released by the Census Bureau on June 13,

> 1991. The technical differences are small, but the differences in results are significant. The apportionment of the House of Representatives under the selected scheme moved two seats relative to the apportionment implied by the census, whereas the modified method moved only one seat. One expert found that among five reasonable alternative methods of calculating adjustments, none of the resulting apportionments of the House were the same, and eleven different states either lost or gained a seat in at least one of the five methods.

Id. at 33583. Secretary Mosbacher cited three areas where the Census Bureau would need to adopt highly arbitrary adjustment rules that would have a significant impact on apportionment:

(1) The imputation of matching status (i.e., when will it be determined that an individual identified in the ICM is the same person as an individual identified in the same block during the initial phase of the census, particularly in those numerous instances when available information is incomplete). *Id.* at 33600-601. Rules reducing the number of "matches" would tend to increase the reported undercount.

(2) Selection of post-strata (that is, the hundreds of demographic categories into which individuals identified during the ICM are to be placed for purposes of calculating undercount adjustments). The process of selecting post-strata is thought by many to have a significant impact on the final adjustment. *Id.* at 33601. One reason for that impact is the basic assumption underlying the

post-stratification methodology: that everyone within a given post-stratum has an identical likelihood of having been contacted during the initial phase of the census. Some of the post-stratification criteria (e.g., Hispanic background) encompass widely diverse groups that are unlikely to have identical group behavioral characteristics.

(3) Selection of smoothing procedures (the statistical techniques employed to remove some of the effects of random variability in the estimates of the "adjustment factors" or "estimating factors" for the various post-strata, while preserving the meaningful systematic differences between subgroups). *Id.* Smoothing involves three major judgmental decisions: (1) the treatment of "outliers" (extreme variance points that may or may not be eliminated from consideration during smoothing); (2) variance pre-smoothing; and (3) the choice of "carrier variables" (i.e., attributes that are assumed in advance to be associated with low or high undercount rates, and are "held constant" during a linear regression analysis in an attempt to isolate random variation). *Id.* at 33601-602.

In response to these types of criticisms, the Census Bureau has announced plans to "announce and 'lock in' its final set of formulas -- well in advance of the collection of any new data in 2000. Fears that the Census Bureau will collect data in 2000 and then use new formulas designed to achieve some purpose other than the most accurate census possible are completely without foundation." Report to Congress, at 51.

Experience suggests, however, that the Census Bureau will not be able allow its "locked in" formulas to remain unchanged after data collection for the 2000 Census begins. Experience with past censuses suggests that unexpected developments requiring adjustments invariable arise. *See* Mosbacher Statement, 56 Fed. Reg. at 33600 ("No production of the complexity of the census or the PES [the predecessor of the ICM] can be completely prespecified. There are always unforeseen events that occur and require modification to the plan."); *id.* at 33603 ("It has proved virtually an impossible task to prespecify the adjustment procedure. It is equally impossible to prespecify the Census procedure.") Accordingly, despite the Census Bureau's best intentions, changes in adjustment procedures are going to be required at a date in time when the political ramifications of those adjustments are fully known. Moreover, for some of the choices regarding adjustment methodology, "the political outcome of that choice can be known in advance." *Id.* at 33583. For those choices, no amount of advance "lock-in" can completely guard against political manipulation -- particularly when, as often is the case, the available option are equally plausible.

Commerce is correct that many experts believe that use of the ICM can theoretically lead to a more accurate census than one employing a headcount methodology. But other experts oppose any use of statistical sampling in connection with the 2000 Census, and the principal reason given is the possibility of partisan manipulation. *See, e.g.*, Morris L. Eaton, *et al.*, *Planning for the Census in the Year 2000: an Update*, (Technical Report 484, Dept. of Statistics, U.C. Berkeley, June 19, 1998). The authors concluded, "We believe there is a substantial risk that ICM will degrade rather than improve the quality of census data." *Id.* at 1.

The dangers of partisan manipulation are particular great when one considers that only minor changes in population totals will affect the apportionment process. For example, the Congressional Research Service has determined that if current Census Bureau estimates of 2000 population hold up, Georgia will gain two House seats, while Mississippi will lose one seat. Congressional Research Service, *House Apportionment Following the 2000 Census: Preliminary Projections* (Feb. 17, 1998). However, if Georgia's official 2000 Census population were only 0.1% less than the projection, it would gain only one seat instead of two, while Mississippi would retain its current number of House seats if its population were only 0.1% greater than the projection.

Moreover, even if Census Bureau personnel could resist all temptation to engage in political manipulation of its adjustment program, it is unlikely to be able to control manipulation by outsiders. Consider the following:

(1) If one is interested in maximizing political power for one's neighborhood and for those who share one's demographic characteristics, then it is almost surely the best strategy not to respond to the initial census mailing. The Census Bureau currently intends to begin its nonresponse follow-up activities four weeks after the initial mailing and to continue those activities for about six weeks. If one is randomly selected for nonresponse follow-up, one should be sure to provide information at that time. Since the Census Bureau cannot hope to reach 100% of those selected for nonresponse follow-up, those who do provide information will by definition be overrepresented in the sample. If one is not selected for nonresponse follow-up

within 10 weeks of the initial mailing, then one should go ahead and mail back the initial census survey.[9]

(2) The possibilities for manipulation by respondents are far greater at the ICM stage. While the Census Bureau will attempt to keep secret the identity of its 25,000 ICM blocks, that "secret" is likely to be widely known to local government officials just as soon as door-to-door surveys begin, if not before. While local government officials are likely to have little incentive to support the initial phase of a census they know will be subject to a subsequent undercount adjustment (Mosbacher Decision, 56 Fed. Reg. at 33584), they will have a huge incentive to drum up 100% participation in every block identified to them as an ICM block. Those local governments that are able to identify their ICM blocks stand to reap huge rewards in terms of undercount adjustments.

(3) The preceding opportunities for partisan manipulation assume complete honesty among respondents. If respondents are willing to lie, the possibilities for manipulation expand exponentially. It is estimated that each person added to the census at the ICM level will result in 360 phantom bodies -- each with demographic characteristics identical to the additional person -- being added to the census count. Thus, there is a far greater incentive to lie to census personnel in a statistically adjusted census than there is in a traditional headcount.

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[9] The Census Bureau currently plans to accept and tabulate mailed responses received after the nonresponse follow-up has begun. *See*, GAO, *2000 Census: Preparations for Dress Rehearsal Leave Many Unanswered Questions* (March 1998) at 39.

All of the above suggests that there are significant risks of partisan manipulation of the 2000 Census if statistical sampling is employed. Those risks underscore the need to enforce the headcount requirement imposed by the Constitution and federal law, a requirement imposed precisely to preclude the possibility of partisan manipulation.

CONCLUSION

Amici curiae Washington Legal Foundation, *et al.*, respectfully request that the Court affirm the judgment of the district court.

Respectfully submitted,

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